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August 2, 2001

Via Hand Delivery

Mr. Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Dorothy T. Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Cost-Based Terminating Compensation for CMRS Providers, CC Docket Nos. 95-185, 96-98, and WT Docket No. 97-207
***Ex Parte* Presentation**

Dear Ms. Attwood and Mr. Sugrue:

Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint PCS"), submits this written *ex parte* presentation to advise the Commission of a recent appellate court decision that disposes of the Application for Review that SBC Communications filed in response to your May 9, 2001 Joint Letter,[1] and to respond to additional points made by other incumbent LECs.[2] As discussed herein, and in Sprint PCS' prior filing, the SBC Application should be denied.

In the Joint Letter, the Common Carrier and Wireless Bureaus confirmed that a CMRS carrier may recover (a) in asymmetrical compensation the "wireless network components [that] are cost-sensitive to increasing call traffic" and (b) in symmetrical compensation an ILEC's tandem rate if the mobile switch serves a "comparable geographic area" as the ILEC tandem.[3] SBC contends this Bureau position is "plainly inconsistent with the Commission's reciprocal compensation rules."[4]

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[1] *See* Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, and Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Charles McKee, Sprint PCS, DA 01-1201 (May 9, 2001)("Joint Letter").

[2] *See* Qwest Comments (June 25, 2001); Verizon Reply (July 5, 2001).

[3] *See* Joint Letter at 2-3.

[4] SBC Application for Review at 2 (June 8, 2001); SBC Reply at 1 (July 5, 2001). Other ILECs have joined SBC in making this argument.

The simple response is that the Bureaus relied entirely on the Commission's interpretations of its own rules on these very points.[5] As SBC acknowledges, the Bureaus have no choice but to follow the Commission's rulings:

> It is axiomatic that Bureaus of the Commission may not alter rules established by the Commission itself. * * * [T]he Bureaus do not have authority to alter the regime established by the Commission.[6]

In reality, SBC's argument is not with the Bureaus, with the Commission itself. Indeed, SBC finally concedes this point in its reply, when it asserts that the Commission misapplied its own rules:

> The Commission did not purport to change its intercarrier compensation rules in the *Intercarrier Compensation NPRM.* To the contrary the [Commission's] discussion in the NPRM . . . did not accurately describe the Commission's rules.[7]

It is here that the recent appellate decision is important, because the court held that the Commission's interpretation of its own rules was not only consistent with the rules, but was also *required* by the Communications Act.

Specifically, at issue in *U S WEST* v. *Washington Utilities and Transportation Commission*, No. 98-36013 (9th Cir., July 3, 2001), was whether AT&T Wireless was entitled to symmetrical compensation based on U S WEST's end office rate or its tandem rate.[8] It was undisputed that AT&T Wireless' mobile switch served an area comparable in size to U S WEST's tandem switch. AT&T Wireless was therefore entitled to compensation based on U S WEST's tandem rate under FCC Rule 51.711:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.[9]

Notwithstanding the clarity of the governing FCC rules, U S WEST was successful in convincing the Washington Commission to require AT&T to additionally meet a "functional equivalence" test as a precondition to receiving compensation based on U S WEST's tandem rate. The PUC further accepted U S WEST's argument that AT&T

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[5] *See* Joint Letter at notes 10-16, 18 and 20.

[6] *See* SBC Application for Review at 2 and 4.

[7] SBC Reply at 3.

[8] A copy of the 9th Circuit decision is attached hereto for reference.

[9] 47 C.F.R. § 51.711(a)(3).

Wireless' mobile switch was more functionally similar to U S WEST's end office switches than its tandem switches.

The Ninth Circuit reversed and held that the Washington Commission erred as a matter of law. The Court held that AT&T Wireless was entitled to receive U S WEST's tandem rate under the reciprocal compensation statute and that the PUC's comparison of fixed landline and mobile wireless switching functionalities was therefore "not relevant":

> AT&T should be paid according to the costs its incurs, not according to the costs it avoids imposing on U.S. West. Penalizing AT&T for its efficiently configured network architecture defeats the letter of § 252(d)(2)(A) and the spirit of the Act by eliminating any incentive to make economically efficient interconnection decisions.[10]

The Court then recited Commission orders and rules, including the recent Joint Bureau Letter, to confirm its interpretation of the Communications Act.[11]

The Ninth Circuit decision specifically addressed only one of the two issues that SBC raised in its Application for Review — whether CMRS must satisfy a "functional equivalence" standard as a prerequisite to receiving symmetrical compensation at an ILEC's tandem rate. However, the Court's analysis applies with equal force to the second issue — whether a CMRS carrier may receive in asymmetrical compensation all of its traffic sensitive costs of call termination. The Court properly construed the statute — "each carrier" may recover its "costs associated with the transport and termination on each carrier's network," with costs based on "a reasonable approximation of the additional costs of terminating such calls"[12] — to mean what the words clearly provide: "each carrier should recover the costs it incurs."[13]

Qwest and Verizon have filed in support of the SBC Application, and two of their arguments merit a brief response herein. These ILECs assert that the Bureau contravened the Administrative Procedures Act ("APA") in granting Sprint PCS' request for rule clarification even though the Bureau requested public comments on the Sprint PCS request.[14] There is no merit to this argument, as these ILECs know.[15] Sprint PCS demon-

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[10] Slip op. at 8313-14.

[11] *See id.* at 8314-18.

[12] 47 U.S.C. § 252(d)(2)(A).

[13] *U S WEST* v. *Washington Commission*, slip op. at 8313.

[14] *See* Qwest Comments (June 25, 2001); Verizon Reply (July 5, 2001).

[15] *See, e.g.*, Letter from A Richard Metzger, Chief, Common Carrier Bureau, to Keith Davis, SBC, 13 FCC Rcd 184 (Dec. 30, 1997). In this letter the Bureau clarified application of another LEC/CMRS interconnection rule at the request of SBC. During this clarification proceeding,

strated that state commissions were having difficulty applying FCC rules in the context of LEC/CMRS interconnection and were reaching conflicting decisions as a result. The APA explicitly empowers the Commission to issue a declaratory ruling to "terminate a controversy or remove uncertainty," and such declaratory rulings are not subject to the APA rulemaking requirements.[16] As the Supreme Court has declared in reaffirming the authority of agencies to interpret their own rules, a new APA rulemaking is required only if an agency "adopt[s] a new position inconsistent with any of the [agency's] existing regulations."[17] The position the Bureaus took in their Joint Letter was not inconsistent with Commission rules or the Commission's interpretation of these rules.

Qwest and Verizon further assert that neither "incumbent LECs nor state regulatory commissions are bound" by the Commission's rulings and the Joint Bureau Letter confirming those rulings.[18] Sprint PCS presumes that PUCs will apply FCC rules consistent with the Commission's interpretation of its own rules — an interpretation that has been confirmed by appellate courts as discussed above. Thus, what these ILECs appear to be saying is that they may advocate positions that are inconsistent with Commission rulings, thereby forcing CMRS carriers to re-litigate the same (resolved) issue state-by-state.

Congress created the CMRS classification to "establish a Federal regulatory framework to govern the offering of all commercial mobile services,"[19] and it gave the Commission the tools to establish this federal framework.[20] Two different federal appellate courts have affirmed the Commission's plenary authority over LEC/CMRS interconnection, including over intrastate traffic.[21] Yet, now that the Commission is beginning to exercise this statutory mandate to remove confusion and inconsistent decisions in the states, Qwest and Verizon have suggested that they may advise state regulators to disregard Commission rulings on point. This is a disturbing development, and Sprint PCS submits that it confirms the need for the Commission to establish "a Federal regulatory framework" for LEC/CMRS interconnection.

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neither SBC nor any other ILEC asked the FCC to conduct an APA rulemaking, nor did they raise APA procedural objections as part of their unsuccessful challenge to this Bureau letter.

[16] *See* 5 U.S.C. § 554(e). *See also* 47 C.F.R. § 1.2.

[17] *Shalala* v. *Guernsey Memorial Hospital,* 514 U.S. 87, 100 (1995).

[18] Qwest Comments at 3-4. *See also* Verizon Reply at 3.

[19] H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess., 490 (1993).

[20] Specifically, Congress gave the FCC express authority to order LECs to provide to CMRS carriers interconnection on just and reasonable terms, and it amended Section 2(b) so the FCC could address all aspects of LEC/CMRS interconnection, including interconnection involving intrastate telecommunications. *See* 47 U.S.C. §§ 2(b), 332(c)(1)(B).

[21] *See Qwest* v. FCC, 252 F.3d 462 (D.C. Cir., June 15, 2001); *Iowa Utilities Board* v. *FCC,* 120 F.3d 753, 800 n.21 (8th Cir. 1997), *aff'd on other grounds,* 525 U.S. 366 (1999).

Pursuant to Section 1.1206 of the Commission's Rules, an original and four copies of this *ex parte* presentation are submitted. Please associate this written *ex parte* presentation with the files in the above-captioned proceedings. Please contact us if you have questions concerning the foregoing.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. WEST COMMUNICATIONS, INC.,
a Colorado corporation,
Plaintiff-Appellee,

v.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION, an
agency organized and existing
under the laws of the State of

Washington; ANNE LEVINSON, as
member of the Washington

Utilities and Transportation
Commission; RICHARD HEMSTAD, as

member of the Washington
Utilities and Transportation
Commission; WILLIAM S. GILLIS, as
member of the Washington
Utilities and Transportation
Commission,
Defendants,

AT&T WIRELESS SERVICES, INC.,
Defendant-Appellant.

No. 98-36013

D.C. No.
CV-97-05686-BJR

OPINION

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, Chief Judge, Presiding

Argued and Submitted
December 12, 2000--San Francisco, California

Filed July 3, 2001

Before: Myron H. Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Bright

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*The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Daniel M. Waggoner and Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, for the defendant-appellant.

Michael C. Thompson and Joyce Grant, U.S. West, Inc., Denver, Colorado; Judith A. Endejan, Williams, Kastner & Gibbs PLLC, Seattle, Washington, for the plaintiff-appellee.

Christine O. Gregoire, Attorney General, and Ann E. Rendahl, Assistant Attorney General, Olympia, Washington, for defendants-appellees.

OPINION

BRIGHT, Circuit Judge:

AT&T Wireless Services, Inc. ("AT&T") appeals from the district court's grant of summary judgment affirming the agreement arbitrated by the State of Washington Utilities and Transportation Commission ("the Commission") pursuant to the Telecommunications Act of 1996 ("Act"), 47 U.S.C. §§ 251-61. AT&T contests the agreement provision providing the reciprocal compensation rate for U.S. West Communications, Inc. ("U.S. West") traffic transported and terminated on AT&T's network. AT&T argues that it should be compensated at the higher tandem rate and not the lower end-office rate as determined in arbitration. The district court affirmed the Commission's arbitrated agreement. We hold that the Commission erred when it concluded that AT&T should be compensated at the end-office rate for U.S. West traffic terminating on AT&T's network and, therefore, we **REVERSE**.

I. BACKGROUND

The Telecommunications Act is designed to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunication services. Sections 251 and 252 of the Act require incumbent local exchange carriers ("ILECs") to allow commercial mobile radio service providers ("CMRS providers") to interconnect with their existing networks in return for fair compensation. 47 U.S.C. §§ 251-52. The Act directs the ILECs and CMRS providers to negotiate in good faith to reach an interconnection agreement. 47 U.S.C. §§ 251(c)(1), 252(a). If an ILEC and a CMRS provider are unable to agree, the Act provides for the state public utilities commission to conduct binding arbitration. 47 U.S.C. § 252(b). After the state commission approves an arbitrated agreement, any party to the agreement may bring an action in district court "to

determine whether the agreement . . . meets the requirements" of the Act. 47 U.S.C. § 252(e)(6).

U.S. West is an ILEC authorized to provide telecommunication services in Washington State. AT&T is a CMRS provider authorized to provide wireless telecommunication services in Washington State. In October 1996, AT&T requested interconnection negotiations with U.S. West pursuant to § 252(a), but the ensuing negotiations failed to provide an interconnection agreement. After AT&T filed a timely petition to have the Commission arbitrate an interconnection agreement pursuant to § 252(b)(1), the Commission's arbitrator conducted a hearing and filed a Report and Decision in July 1997.

The arbitrator used U.S. West's wire-line network architecture as the standard for setting the appropriate reciprocal compensation rate, he imposed a two-tiered reciprocal compensation rate for AT&T calls terminated on U.S. West's network (depending on whether a tandem or end-office switch is involved), and he imposed the end-office rate on all U.S. West calls terminated on AT&T's network. Specifically, the arbitrator set the following termination rates and an average transportation rate: (1) an end-office termination rate of $0.002557 per minute of use; (2) a tandem switching termination rate of $0.001310 per minute of use; and (3) an average transportation rate of $0.000318 per minute of use. The arbitrator determined that when local traffic from an AT&T mobile telephone travels through a U.S. West tandem switch and a U.S. West end-office switch before terminating on a U.S. West wire-line telephone, AT&T must pay U.S. West the "tandem rate" of $0.004185, which is the end-office termination rate of $0.002557 per minute of use, plus the tandem switching termination rate of $0.001310 per minute of use, plus the average transportation rate of $0.000318 per minute of use. When local traffic from an AT&T mobile telephone only travels through a U.S. West end-office switch before terminating on a U.S. West wire-line telephone, AT&T must pay

U.S. West the end-office termination rate of $0.002557 per minute of use. However, when local traffic from a U.S. West land-line telephone travels through an AT&T Mobile Switching Center ("MSC") before terminating on an AT&T mobile telephone, U.S. West must pay AT&T the end-office termination rate of $0.002557 per minute of use.

The Commission instructed the parties to submit an interconnection agreement in accordance with the arbitrator's decision. U.S. West filed a timely petition for reconsideration and, in August 1997, the arbitrator denied U.S. West's petition for reconsideration.

The Commission held an open public meeting in September 1997 to review the arbitrator's Report and Decision and the subsequent proceedings. The Commission adopted the arbitrator's Report and Decision, denied both parties' requests for modification, and approved the interconnection agreement with some minor changes.

U.S. West sought review of the Commission's decision in the district court pursuant to § 252(e)(6), and AT&T filed an answer, counterclaim, and cross-claim. The parties then filed cross-motions for summary judgment. The district court granted summary judgment in favor of the Commission on U.S. West's and AT&T's claims and dismissed one of U.S. West's claims without prejudice. U.S. West appealed and AT&T filed a cross-appeal. U.S. West subsequently dismissed its appeal. Only AT&T's cross-appeal remains before this court. In this appeal, AT&T argues that it should be compensated at the tandem rate and not the end-office rate for terminating U.S. West's traffic.

II. JURISDICTION

The Commission acquired jurisdiction under 47 U.S.C. § 252(b) to arbitrate the interconnection agreement between U.S. West and AT&T. The district court reviewed the Com-

mission's decision under 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331, 1337.

The district court entered a final judgment granting summary judgment to the Commission on all of U.S. West's and AT&T's claims. AT&T filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(3), and, therefore, this court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294(1).

III. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1117 (9th Cir. 1999), cert. denied, 120 S.Ct. 2741 (2000). We review de novo whether the arbitrated agreements are in compliance with the Act and the implementing regulations, and we review all other issues under an arbitrary and capricious standard. Id.; see also MCI Telecomm. Corp. v. U.S. West Communications, 204 F.3d 1262, 1266-67 (9th Cir.) (reviewing de novo compliance with the Act and regulations and all other issues under an arbitrary and capricious standard), cert. denied, 121 S.Ct. 504 (2000).

IV. DISCUSSION

AT&T argues that the district court erred in affirming the Commission's reciprocal compensation rate for U.S. West's traffic transported and terminated on AT&T's network. In particular, AT&T argues that U.S. West should compensate it at the tandem rate and not the end-office termination rate because its MSCs serve a comparable geographic area to the area served by U.S. West's tandem switches. In support of its argument, AT&T relies on the regulations promulgated by the Federal Communications Commission ("FCC") pursuant to the Act and on the FCC's First Report and Order, both of which interpret the Act's reciprocal compensation requirements.

U.S. West and the Commission argue that the arbitrator correctly determined that U.S. West should compensate AT&T at the end-office termination rate for transporting and terminating U.S. West traffic because AT&T's MSCs perform end-office switching functions.

A. The Telecommunications Act of 1996

The basic principles for setting the reciprocal compensation rate are laid out in the statute itself. The Act requires the parties to an interconnection agreement to pay each other reciprocal compensation. Each carrier must pay the other for transporting and terminating calls that originate on their network. 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A). The Act provides, in relevant part:

> [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. § 252(d)(2)(A). Therefore, the reciprocal compensation rate must be based on the carrier's costs incurred transporting and terminating the call and on a reasonable approximation of the additional costs incurred terminating calls originating on the other carrier's network. Id.

In this case, the arbitrator imposed a two-tiered reciprocal compensation rate for AT&T calls terminated on U.S. West's network (depending on whether a tandem or end-office switch is involved) and he imposed the end-office rate on all U.S. West calls terminated on AT&T's network. The arbitrator reasoned that tandem switching costs more than end-office switching because tandem switching involves two switching functions and end-office switching involves one switching function. The arbitrator concluded that AT&T should pay U.S. West for terminating AT&T's traffic depending upon whether AT&T hands off its traffic at U.S. West's end-office or tandem switch. Then, the arbitrator analyzed the function of AT&T's MSC. He concluded that U.S. West should pay AT&T at the end-office rate for U.S. West traffic terminating on AT&T's network because AT&T's MSC functions like U.S. West's end-office switch.

In his Report and Decision, the arbitrator explained that:

> The most striking difference between the two networks is the ability of the wireless operator to choose between incurring the cost of interconnecting at end office switches, where the rates are lower, or at tandem switches, which function in a greater service area. Tandem switching rates are higher because they necessarily involve two switching operations to terminate a call. A wireline operator has no comparable opportunity to make a financially driven decision when terminating traffic on the wireless network. This factor is preeminent in the decision that a MSC is not the functional equivalent of a tandem switch.

(E.R. at 57.)

Section 251(d)(2)(A)(i) of the Act provides for the "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls

that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i) (emphasis added). Thus, under the reciprocal compensation requirement, each carrier should recover the costs it incurs.

We assume, for this appeal, that the costs U.S. West incurs depend on whether an end-office or tandem switch is involved. Therefore, U.S. West should be paid according to whether its end-office or tandem switches are involved in terminating AT&T's traffic. The arbitrator's two-tiered reciprocal compensation rate for AT&T traffic terminating on U.S. West's network enables U.S. West to recover the costs it incurs when it terminates AT&T's traffic.

The arbitrator's determination that AT&T's MSCs function differently from U.S. West's tandem switches and that AT&T's MSCs function more like U.S. West's end-office switches was not arbitrary and capricious. However, AT&T's ability to hand off (i.e., deliver) its traffic to U.S. West in a financially efficient way does not justify imposing the end-office rate (rather than the tandem rate) on U.S. West's traffic terminating on AT&T's network. AT&T's ability to efficiently interconnect with U.S. West affects the costs that U.S. West incurs; it does not affect the costs AT&T incurs terminating U.S. West's traffic and should not affect AT&T's recovery under § 252(d)(2)(A). AT&T should be paid according to the costs it incurs, not according to the costs it avoids imposing on U.S. West. Penalizing AT&T for its efficiently configured network architecture defeats the letter of § 252(d)(2)(A) and the spirit of the Act by eliminating any incentive to make economically efficient interconnection decisions. See In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 F.C.C.R. 15,499, CC Docket No. 96-98 at ¶ 209 (Aug. 8, 1996). Therefore, according to the statute, the arbitrator's analysis of the switches' functions and his determination that AT&T's MSC can deliver its traffic in a financially efficient way are not rel-

evant to whether AT&T is entitled to the tandem rate for the traffic it terminates.

B. The Regulations

The FCC promulgated regulations to provide guidance for setting the reciprocal compensation rate. 47 C.F.R.§ 51.711. The FCC directed the states to establish presumptive symmetrical reciprocal compensation rates. Section 51.711(a) provides that the "[r]ates for transport and termination of local telecommunications traffic shall be symmetrical . . . ." 47 C.F.R. § 51.711(a). Section 51.711(a)(1) states that "symmetrical rates are rates . . . for the same services. " 47 C.F.R. § 51.711(a)(1). The regulations go on to say that, "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." 47 C.F.R. § 51.711(a)(3).

The only question we address in this appeal is whether AT&T should be compensated at the tandem rate and not the end-office rate for U.S. West traffic terminated on AT&T's network. The parties did not raise and we do not address whether 47 C.F.R. § 51.711(a)'s symmetry requirement demands a single rate (rather than a two-tiered rate) for both carriers regardless of where the call is handed off and to whom, or if rates should differ for termination of traffic on an ILEC's network, depending upon whether the traffic is handed off at the ILEC's end-office or tandem switch. For the purposes of this appeal only, we assume, without deciding, that the arbitrator's two-tiered reciprocal compensation scheme fulfills the symmetry requirement.1 In addition, we do

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1 We recognize that § 251(c)(2) gives CMRS providers the right to deliver traffic to any technically feasible point on an ILEC's network; it does not obligate them to transport traffic to inconvenient or inefficient interconnection points. In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 F.C.C.R. 15,499, CC Docket No. 96-98 at ¶ 209 (Aug. 8, 1996).

not venture any opinion concerning whether the ILEC's network architecture is the appropriate standard for setting the reciprocal compensation rate.

Nevertheless, U.S. West argues that AT&T is not entitled to the tandem rate because AT&T's MSCs do not provide the "same services" as U.S. West's tandem switches. AT&T argues that, according to § 51.711(a)(3) of the regulations, it is entitled to the tandem rate because its MSCs serve a geographic area comparable to the area served by U.S. West's tandem switches.

U.S. West's same-services argument does not apply to the question presented in this case. Section 51.711(a)(1) merely defines symmetrical rates. 47 C.F.R. § 51.711(a)(1). We have already assumed, for the purposes of this appeal, that the arbitrator's two-tiered reciprocal compensation scheme fulfills the symmetry requirement. The only question presented in this case is whether AT&T is entitled to the tandem rate; we are not concerned with whether an asymmetrical rate is appropriate. Therefore, U.S. West's argument that AT&T is not entitled to the tandem rate because AT&T's MSCs do not provide the same services within the meaning of § 51.711(a)(1) is beside the point. The regulations require U.S. West to pay AT&T the tandem rate because AT&T's MSCs serve a geographic area comparable to the area served by U.S. West's tandem switches. 47 C.F.R. § 51.711(a)(3) ("Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.").

C. The FCC's First Report and Order

In 1996, the FCC published its First Report and Order providing further guidance to states for setting the reciprocal compensation rate by explaining how to reasonably approxi-

mate the "additional costs" of terminating calls under 47 U.S.C. § 252(d)(2)(A)(ii). The First Report and Order provides, in relevant part:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 F.C.C.R. 15,499, CC Docket No. 96-98 at ¶ 1090 (Aug. 8, 1996) (hereinafter "Paragraph 1090").

It is well established that we give substantial deference to an agency's interpretation of its own regulations because its expertise makes it well-suited to interpret statutory language. Dep't of Health & Human Servs. v. Chater, 163 F.3d 1129, 1133 (9th Cir.1998) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). "This deference is warranted all the more when the regulation concerns a complex and

highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entails the exercise of judgment grounded in policy concerns." Id. at 1134 (internal quotation omitted).

Under Paragraph 1090's final sentence, AT&T is entitled to the tandem rate because its switches serve a comparable geographic area to U.S. West's tandem switches. When the arbitrator concluded that AT&T should compensate U.S. West for terminating its traffic depending upon whether AT&T's traffic is handed off at U.S. West's end-office or tandem switch, he followed the meaning of the first two sentences of Paragraph 1090 because, according to Paragraph 1090, the costs incurred by the local exchange carrier for transporting and terminating traffic depend on whether tandem switching is involved. The additional costs described in the first sentence apply only to U.S. West because U.S. West is a local exchange carrier and AT&T is a commercial mobile radio service provider.**2** Paragraph 1090's third sentence compares AT&T's "new technologies" (i.e., its network architecture) to U.S. West's tandem switch and requires the arbitrator to consider the function of AT&T's network architecture in determining whether U.S. West should pay AT&T the tandem rate for some or all of its calls terminated on AT&T's network. The fourth sentence declares that the tandem rate is the appropriate interconnection rate if AT&T's MSCs serve a comparable geographic area as that served by U.S. West's tandem switches. AT&T's MSCs serve a comparable geographic area as that served by U.S. West's tandem switches. Therefore, under the FCC's regulations, AT&T is entitled to the tandem rate because its MSCs serve a comparable geographic area to U.S. West's tandem switches.

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2 The FCC does not classify CMRS providers as LECs. In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 F.C.C.R. 15,499, CC Docket No. 96-98 at ¶ 34 (Aug. 8, 1996).

A recent FCC letter supports our conclusion. In a letter dated May 9, 2001, the FCC determined the following:

> With respect to when a carrier is entitled to the tandem interconnection rate, the Commission stated that section 51.711(a)(3) of its rules requires only that the comparable geographic area test be met before a carrier is entitled to the tandem interconnection rate for local call termination. It noted that although there has been some confusion stemming from additional language in the text of the Local Competition Order regarding functional equivalency, section 51.711(a)(3) requires only a geographic area test. Therefore, a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.

Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau of the FCC, and Dorothy T. Attwood, Chief, Common Carrier Bureau of the FCC, to Charles McKee, Senior Attorney, Sprint PCS (May 9, 2001) (internal citations omitted).

V. CONCLUSION

The Commission erred when it concluded that U.S. West should compensate AT&T at the end-office rate for traffic originating on U.S. West's network and terminating on AT&T's network. Therefore, we **REVERSE** and direct the district court to enter an appropriate judgment consistent with this opinion.